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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEMAIN SHOCKLEY, Defendant and Appellant.	C059978 (Super. Ct. No. 07F08088)

Defendant Demain Shockley and his brother Ivan were each charged with first degree robbery and first degree burglary. In a joint trial, a jury convicted defendant as charged but found Ivan not guilty of either offense. Defendant was sentenced to state prison for four years for each conviction, with the robbery sentence stayed pursuant to Penal Code section 654.

On appeal, defendant contends (1) the evidence is insufficient to support the burglary conviction, and (2) the court committed reversible instructional error by failing to instruct the jury on theft as an included offense in robbery and by instructing the jury on flight as a consciousness of guilt. We reject the contentions.

FACTS

In July 2007, Karolyn Odenbaugh lived in an apartment with Joseph Brown and their three-year-old daughter. Joseph's sister, Carrol, and Ivan Shockley lived with Joseph's mother in her apartment. Karolyn was familiar with Ivan but had never seen defendant before.

On July 5, about 7:00 a.m., Karolyn was sleeping in her bedroom when she was awakened by what sounded like window blinds rustling, someone trying to open the window, and glass breaking in the dining room area. Thinking that Joseph, who had not yet come home from celebrating the Fourth of July, may have forgotten his keys and was trying to get in through the window, Karolyn went to investigate. She pulled back the blinds and saw defendant looking in. Defendant was wearing a sweatshirt with a hood covering his head. Defendant said, "Sorry, wrong window."

Karolyn returned to her bedroom, put on a shirt, grabbed her house phone and went back to the window. Defendant was still there and another person, who wore a bandana on his face and had a sweatshirt hood covering his head, was near her back fence. Karolyn believed that the person was Ivan.

Defendant claimed that Karolyn's "boyfriend" owed him money and wanted to know if the boyfriend was home or when he would be home. Karolyn said he was not home and she did not know when he would return. Defendant, followed by Ivan, climbed through the window and began searching through the apartment. Fearful for her daughter, Karolyn ran to her daughter's bedroom to try to

protect her. Defendant forced his way into the bedroom and hit Karolyn with the handle of a mop, injuring her mouth, cheek and nose. Defendant grabbed the telephone from Karolyn, but not before she was able to dial 911. Defendant and Ivan found a "safe box" that Karolyn's grandfather had made for her and the two left through the window with Ivan carrying the safe. An audiotape of the 911 call was played for the jury. On the tape "someone" could be heard saying, "Get off the phone"; Karolyn identified this "someone" as defendant.

The police arrived shortly thereafter in response to the uncompleted 911 call. On the ground outside the broken window, the officers found a crowbar, which did not belong to Karolyn. Karolyn told the officers that her cell phone and wallet had been taken from her purse, which had been in her bedroom.

Carrol testified that on July 5, 2007, she and Ivan got up about 7:00 a.m., went to an auto parts store and bought a radiator hose. They returned home and Ivan began working on the car.

Defendants did not testify.

DISCUSSION

I

Defendant contends the evidence is insufficient to support the burglary conviction because it was "physically impossible" for the burglary to have occurred as described by Karolyn. He argues as follows: Karolyn testified to being awakened by the sound of her blinds rustling, followed by the sound of breaking

and falling glass. However, since the blinds were on the inside of the window, she could not have heard the blinds rustling until the window had been broken. Additionally, since it would be "impossible for a person to break the window from the outside without glass falling inside of the room," and "no glass was found on the inside of the window," the break-in could not have occurred as described by Karolyn. The argument is not persuasive.

The rules regarding challenges to the sufficiency of the evidence on appeal are well established. "When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence--i.e., evidence that is credible and of solid value--from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55.)

While Karolyn did testify that she heard what sounded like the blinds rustling before she heard the sound of breaking glass, she also testified that she awakened "a little after 7 a.m. when [she] heard the window break" and that when she heard what sounded like breaking glass, she was "half asleep." People's exhibit No. 11, a photograph of the sliding glass window through which defendant entered the apartment, shows a broken-out portion of the glass just large enough for a hand to reach through. An officer who investigated the scene found a

crowbar lying on the ground outside the broken window; the crowbar did not belong to Karolyn. Karolyn testified that she was face-to-face with defendant as he stood outside the window, and she so identified him in court. Additionally, photographs showed Karolyn's physical injuries and the jury heard Karolyn's call to 911 and could assess the sincerity of her fear before and during the assault.

From this evidence the jury could reasonably infer that it was defendant who had broken the window with the crowbar and entered the apartment even if Karolyn did not have the sequence of the break-in precisely right. Consequently, defendant's contention is rejected.

II

Defendant contends the trial court committed two instances of reversible error: first, in failing to instruct the jury on theft as an included offense in the charge of robbery, and second, by instructing the jury on flight as a consciousness of guilt. We reject both contentions.

Omission of the Included Offense Instruction on Theft

The trial court must instruct the jury, sua sponte, on all lesser included offenses in a charged offense, but "only when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Theft is an included offense in robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 697.) "'"A thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."'" (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221.)

The items reported taken by Karolyn during the break-in were her cell phone, wallet and the heirloom safe. Defendant argues that the trial court was obligated to give an instruction on theft because the cell phone and wallet "were not taken from her by use of force or fear, as she was unaware they were even taken" until she discovered this fact later when speaking with the police. The argument borders on being frivolous.

Immediate awareness by the victim that something has been taken is not an element of robbery. Indeed, robbery convictions have been upheld where the victim is rendered unconscious by an assailant who then takes items from the victim. (*People v. Williams* (1961) 193 Cal.App.2d 394, 398-399 [assailant choked victim to unconsciousness in restroom and when victim regained consciousness discovered his wallet was missing]; *People v. Dodson* (1946) 77 Cal.App.2d 389, 394 [victim beaten into

unconsciousness and upon regaining consciousness discovers his money is gone].)

As to the taking of the safe, defendant contends that "a reasonable jury, properly instructed, may have concluded that a theft took place, but that the crime of robbery did not." This is so, he argues, because Karolyn was evasive in answering questions regarding her reporting when the safe was stolen, and she did not report the safe's being taken until "some five months" after the reported break-in. Again, the argument is unconvincing.

The jury knew that defendant was being prosecuted for having taken items during the break-in of Karolyn's apartment on July 5, 2007. Karolyn testified the safe was one of the items taken on that date. If the jury believed the safe was taken on a date other than that charged, they would not have used such a taking as a basis for finding that defendant committed robbery. If the jury, being composed of reasonable people, believed the safe was taken during the break-in, the taking of the safe clearly was no less than robbery because the safe was taken shortly after defendant hit Karolyn with the handle of a mop, thereby showing without dispute that the safe was taken by force. Consequently, lesser included instructions on theft were appropriately omitted.

Instruction on Flight

Over defendant's objection, the court instructed the jury per CALCRIM No. 372: "If the defendant fled immediately after

the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." Penal Code section 1127c authorizes the giving of this instruction "[i]n any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt."

Defendant argues it was error for the court to give this instruction because "[t]here was no evidence of 'flight' presented to the jury. [Defendant] left the apartment [ ], but no evidence was received that [defendant] had 'fled'." He also argues the instruction was improper because "there was no evidence that [his leaving] was motivated by a consciousness of guilt." Neither position is well taken.

"An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." (*People v. Crandell* (1988) 46 Cal.3d 833, 869, cited with approval in *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Here, the jury could reasonably infer from the evidence that defendant's leaving the apartment through a window, hardly a usual means of egress, and not remaining after Karolyn had called 911 was to avoid being

present when the police arrived and would see Karolyn's injuries and hear her claims that defendant beat her and that he and Ivan had stolen her property. There was no error in giving the instruction.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.